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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

UNITED STATES OF AMERICA,  
ON BEHALF OF THE NATIONAL  
OCEANIC AND ATMOSPHERIC  
ADMINISTRATION AND THE  
UNITED STATES DEPARTMENT  
OF THE INTERIOR;  
THE STATE OF WASHINGTON  
THROUGH THE WASHINGTON  
DEPARTMENT OF ECOLOGY;  
MUCKLESHOOT INDIAN TRIBE; and  
PUYALLUP TRIBE OF INDIANS

Plaintiffs,

v.

FOSS MARITIME COMPANY, and  
MARITIME INDUSTRIES NORTHWEST,  
INC.,

Defendants.

No.  
  
COMPLAINT

Plaintiffs United States of America, by authority of the Attorney General,  
on behalf of the National Oceanic and Atmospheric Administration of the  
Department of Commerce and the Department of the Interior; State of

1 Washington through the Washington Department of Ecology; Puyallup Tribe of  
2 Indians; and Muckleshoot Indian Tribe, allege as follows:

### 3 I. GENERAL ALLEGATIONS

4 1. This is a civil action under section 107(a) of the Comprehensive  
5 Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.  
6 § 9607(a); section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; section  
7 1002(b) of the Oil Pollution Act (OPA), 33 U.S.C. § 2702(b); and the Model  
8 Toxics Control Act (MTCA), RCW 70.105D, for damages for injury to,  
9 destruction of, or loss of natural resources resulting from the release of hazardous  
10 substances and discharges of oil into the Middle Waterway of the Commencement  
11 Bay/Nearshore Tidelands Superfund site in Tacoma, Washington.

### 12 II. JURISDICTION AND VENUE

13 2. This Court has jurisdiction over this case pursuant to sections 107  
14 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b); section 311(n) of the  
15 CWA, 33 U.S.C. § 1321(n); section 1017(b) of OPA, 33 U.S.C. § 2717(b); and 28  
16 U.S.C. §§ 1331, 1345 and 1367(a).

17 3. Venue is proper in this district pursuant to section 113(b) of  
18 CERCLA, 42 U.S.C. § 9613(b); section 1017(b) of OPA, 33 U.S.C. § 2717(b);  
19 and 28 U.S.C. § 1391(b) and (c).

### 20 III. THE SITE

21 4. The Middle Waterway is a highly industrialized area that opens into  
22 Commencement Bay in Tacoma, Washington.

23 5. The “Middle Waterway” as used in this Complaint means any  
24 portion of the Middle Waterway (including the shoreline, intertidal areas,  
25 tributaries, estuaries and bottom sediments) in the State of Washington where  
26 hazardous substances and oil originating from the facilities identified below that  
27 have been owned or operated by the Defendants have come to be located.  
28





VI. FIRST CLAIM FOR RELIEF

19. Plaintiffs reallege paragraphs 1 through 18.

20. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part, as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

. . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for

\* \* \*

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;

\* \* \*

21. Materials disposed of and released in the Middle Waterway and Commencement Bay by Foss and MINI include hazardous substances within the meaning of section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

22. The Middle Waterway and Commencement Bay are facilities within the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

23. Releases of hazardous substances have occurred in the Middle Waterway and Commencement Bay within the meaning of sections 101(22) of CERCLA, 42 U.S.C. § 9601(22). The releases of hazardous substances in the Middle Waterway and Commencement Bay from the identified facilities owned or operated by Foss and MINI have resulted in injury to, destruction of, or loss of natural resources within the trusteeship of one or more of the Plaintiffs.

24. Defendants are persons within the meaning of section 107 of

1 CERCLA, 42 U.S.C. § 9607.

2 25. Defendant s are liable to Plaintiffs for natural resource damages  
3 resulting from releases of hazardous substances pursuant to section 107(a)(4)(C)  
4 of CERCLA, 42 U.S.C. § 9607(a)(4)(C).

5 VII. SECOND CLAIM FOR RELIEF

6 26. Plaintiffs reallege paragraphs 1 through 25.

7 27. Section 1002(a) of OPA, 33 U.S.C. § 2702(a), provides in pertinent  
8 part, as follows:

9 Notwithstanding any other provision or rule of law, and  
10 subject to the provisions of this Act, each responsible  
11 party for a vessel or a facility from which oil is  
12 discharged, or which poses the substantial threat of a  
13 discharge of oil, into or upon the navigable waters or  
adjoining shorelines or the exclusive economic zone is  
liable for the removal costs and damages specified in  
subsection (b) of this section that result from such  
incident.

14 28. Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A), provides  
15 in pertinent part, as follows:

16 Damages for injury to, destruction of, loss of, or loss of  
17 use of, natural resources, including the reasonable costs  
18 of assessing the damage, which shall be recoverable by a  
United States trustee, a State trustee, an Indian Tribe  
trustee, or a foreign trustee.

19 29. The properties owned or operated by Foss and MINI were and are  
20 facilities within the meaning of sections 1001(9) and 1002 of OPA, 33 U.S.C. §§  
21 2701(9) and 2702.

22 30. Foss and MINI are responsible parties within the meaning of section  
23 1001(32) of OPA, 33 U.S.C. § 2701(32).

24 31. The discharge of oil into the Middle Waterway, Commencement Bay  
25 or adjoining shorelines from the identified facilities owned or operated by Foss  
26 and MINI has resulted in injury to, destruction of, or loss of natural resources  
27 within the trusteeship of one or more of the Plaintiffs.

32. Defendants are liable to Plaintiffs for natural resource damages resulting from discharges of oil pursuant to section 1001 of OPA, 33 U.S.C. § 2701.

#### VIII. THIRD CLAIM FOR RELIEF

33. Plaintiffs reallege paragraphs 1 through 32.

34. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), provides in pertinent part, as follows:

The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited . . . .

35. Section 311(f)(2) of the CWA, 33 U.S.C. § 1321(f)(2), provides in pertinent part, as follows:

Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United State Government, or (D) an act or omission of a third party without regard to whether an such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government . . . .

36. Section 311(f)(4) of the CWA, 33 U.S.C. § 1321(f)(4), provides in pertinent part, as follows:

The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged



1 or destroyed as a result of a discharge of oil or a  
2 hazardous substance in violation of subsection (b) of this  
section.

3 37. The identified facilities owned or operated by Foss and MINI are  
4 onshore facilities within the meaning of section 311(f)(1) of the CWA, 33 U.S.C.  
5 § 1321(f)(1).

6 38. There have been discharges of oil or hazardous substances in harmful  
7 quantities into the Middle Waterway, Commencement Bay and adjoining  
8 shorelines from the identified facilities owned or operated by Foss and MINI.

9 39. Discharges of oil or hazardous substances from the facilities owned  
10 or operated by Foss and MINI into the Middle Waterway, Commencement Bay or  
11 adjoining shorelines have affected, damaged or destroyed natural resources  
12 belonging to, appertaining to, or under the exclusive management authority of the  
13 United States.

14 40. Defendants are liable to the United States and State of Washington  
15 for natural resource damages resulting from discharges of oil or hazardous  
16 substances into the Middle Waterway, Commencement Bay, or adjoining  
17 shorelines pursuant to section 311(f) of the CWA, 33 U.S.C. § 1321(f).

#### 18 IX. FOURTH CLAIM FOR RELIEF

19 41. Plaintiffs reallege paragraphs 1 through 40.

20 42. MTCA, Chapter 70.105D.040 RCW, provides in pertinent part as  
21 follows:

22 (1) Except as provided in subsection (3) of this section, the following  
23 persons are liable with respect to a facility:

24 (a) The owner or operator of the facility;

25 (b) Any person who owned or operated the facility at the  
time of disposal or release of the hazardous substances;

26 (c) Any person who owned or possessed a hazardous  
27 substance and who by contract, agreement, or otherwise  
arranged for disposal or treatment of the hazardous  
28



substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment or other facility selected by such person, from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for . . . all natural resource damages resulting from the releases or threatened releases of hazardous substances.

43. Materials disposed of and released in the Middle Waterway and Commencement Bay from the identified sites owned or operated by Foss and MINI include hazardous substances within the meaning of Chapter 70.105D.020(10)(c) RCW.

44. The identified sites owned or operated by Foss and MINI are facilities within the meaning of Chapter 70.105D.020(5) RCW.

45. The Middle Waterway and Commencement Bay are facilities within the meaning of Chapter 70.105D.020(4) RCW.

46. Releases or threatened releases of hazardous substances have occurred in the Middle Waterway and Commencement Bay within the meaning of Chapter 70.105D.020 RCW and Chapter 70.105D.040 RCW.

47. The natural resources that have been and continue to be injured, destroyed, or lost by the release of hazardous substances from the identified facilities owned or operated by Foss and MINI include fish, shellfish,

1 invertebrates, birds, marine sediments, and other such natural resources.

2 48. The State of Washington has incurred response costs related to the  
3 assessment of injury to natural resources caused by the releases of hazardous  
4 substances from the identified facilities owned or operated by Foss and MINI.

5 49. Pursuant to Chapter 70.105D.040(2) RCW, Defendants are jointly  
6 and severally liable to the State of Washington for all damages to natural  
7 resources in the Middle Waterway and Commencement Bay, resulting from the  
8 release of hazardous substances at or from Foss and MINI's identified facilities.

9 X. REQUEST FOR RELIEF

10 WHEREFORE, Plaintiffs request that this Court enter judgment  
11 against Defendants:

12 (1) For damages for injury to natural resources resulting from the  
13 discharges or releases of hazardous substances in the Middle Waterway and  
14 Commencement Bay, including the cost of assessing such damages; and

15 (2) Awarding Plaintiffs such other and further relief as this Court may  
16 deem appropriate.

17  
18 UNITED STATES OF AMERICA

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27 Western District of Washington

28 /s Michael J. McNulty

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COMPLAINT

1 PUYALLUP TRIBE OF INDIANS

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2011, I caused a true copy of the COMPLAINT to be served on each of the following named persons at his or her last known addresses in the manner indicated below:

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